

No. 12439

United States
Court of Appeals
for the Ninth Circuit.

ERNEST B. LOPEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

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PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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in pro per
P.M.B. 697
Alcatraz, Calif.

For Appellee:

ERNEST A. TOLIN,
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Bldg.,
Los Angeles 12, Calif.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 16048

February Term, 1943

INDICTMENT

(Viol.: 18 USC 101; 18 USC 88—Receiving
stolen property; conspiracy.)

In the Name and by the Authority of the United
States of America, the Grand Jury for the
Southern District of California, at Los Angeles,
presents on oath in open Court:

That Ernest Lopez and Salvador Herrera, here-
inafter called the defendants, heretofore, to-wit:
On or about May 31, 1943, at Los Angeles, County
of Los Angeles, California, within the district and
division aforesaid, did knowingly, wilfully, unlaw-
fully and feloniously receive, conceal and have in
their possession with intent to convert the same to
their own use and gain, certain property of the
United States, to-wit: Approximately 967 "A,"
"B," "C," "T-1," "T-2" and "R" gasoline ration-
ing books prepared and printed for issuance by the
Office of Price Administration, an agency of the
United States of America, a more particular de-
scription of which said property is to the Grand
Jury unknown, which said property had been
theretofore unlawfully and feloniously stolen and
purloined from the United States, as the said
defendants then and there well knew;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [2*]

Count Two

And the Grand Jury aforesaid, upon its oath aforesaid, does further present:

That Ernest Lopez and Salvador Herrera, hereinafter called the defendants, prior to the date of the commission of the first overt act hereinafter set forth and continuously thereafter to and including the date of finding and presentation of this indictment, in Los Angeles County, California, within the Southern District of California, Central Division, and the jurisdiction of the United States and of this Honorable Court, did then and there knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other, and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States of America and the laws thereof, that is to say, to receive, conceal and have in their possession with intent to convert the same to their own use and gain, property of the United States, to-wit: gasoline rationing books prepared and printed for the Office of Price Administration, an agency of the United States, which property had been unlawfully and feloniously stolen from the United States, as the said defendants well knew, in violation of

Title 18, Section 101 of the United States Code; and to transfer and assign gasoline rationing coupon books and gasoline rationing coupons to persons not entitled to accept such transfer or assignment of gasoline rationing books or coupons under the provisions of Ration Order 5C issued by the Office of Price Administration, an agency of the United States, pursuant to the Second War Powers Act of 1942;

And the Grand Jury aforesaid, upon its oath aforesaid, does further charge and present that at the hereinafter stated times in pursuance of, and in furtherance and execution of, and for the purpose of carrying out and to effect, the object, design and purposes of said [3] conspiracy, combination, confederation and agreement aforesaid, the hereinafter named defendants did commit the following overt acts at the hereinafter stated places:

1. On or about March 25, 1943, at Los Angeles, California, defendants Ernest Lopez and Salvador Herrera delivered a number of gasoline rationing books printed for issuance by the Office of Price Administration, the exact number of which is to the Grand Jury unknown, to Balter M. Oliver;

2. On or about April 1, 1943, at Los Angeles, California, defendant Ernest Lopez delivered a number of gasoline rationing books printed for issuance by the Office of Price Administration, the exact number of which is to the Grand Jury unknown, to William H. Summers;

3. On or about May 26, 1943, at Los Angeles,

California, defendant Ernest Lopez delivered fifty gasoline rationing books printed for issuance by the Office of Price Administration to William H. Summers.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

/s/ CHARLES H. CARR,
U. S. Attorney.

Filed June 16, 1943. [4]

In the District Court of the United States, in and
for the Southern District of California, Central
Division

No. 16048 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST LOPEZ,

Defendant.

VERDICT OF THE JURY

We, the jury in the above entitled case, find the defendant, Ernest Lopez, Guilty as charged in the first count of the Indictment, and Guilty as charged in the second count of the Indictment.

Dated: Los Angeles, Calif., July 29th, 1943.

/s/ LEON A. WHITE,
Foreman of the jury.

[Endorsed]: Filed July 29, 1943. [6]

District Court of the United States, Southern
District of California, Central Division

No. 16048

United States

vs.

Ernest Lopez

(Criminal indictment in 2 counts for violation
of U. S. C., Title 18, Secs. 101 and 88.)

JUDGMENT AND COMMITMENT

On this 30th day of July, 1943, came the United States Attorney, and the defendant Ernest Lopez appearing in proper person, and with counsel and,

The defendant having been convicted on verdict by the jury of the offenses charged in the indictment in the above-entitled cause, to-wit: On or about May 31, 1943 at Los Angeles, California, receive, conceal, and have in his possession with intent to convert same to his own use and gain, certain property of the United States to-wit approximately 967 "A," "B," "C," "T-1," "T-2" and "R" gasoline rationing books prepared and printed for issuance by the Office of Price Administration, an agency of the United States, and conspiracy so to do and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, hav-

ing been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the penitentiary type to be designated by the Attorney General or his authorized representative for the period of five years on the first count of the indictment, and be imprisoned in said institution for the period of two years on the second count of the indictment. Imprisonment imposed on the second count of the indictment shall begin at the expiration of the term imposed on the first count of the indictment. The total term of imprisonment under this judgment is seven years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Filed this 30th day of July, 1943.

EDMUND L. SMITH,
Clerk,

By /s/ LOUIS J. SOMERS,
Deputy Clerk.

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT AND
SENTENCE ON COUNT TWO

May It Please the Court:

Comes now the movant, Ernest B. Lopez, and moves this Honorable Court to vacate judgment and sentence on Count Two, which sentence was imposed in violation of the Constitution of the United States of America.

Statement of Facts

On June 16, 1943, movant was indicted in the above-entitled [12] Court for a violation of Title 18, U.S.C., Sections 101 and 88.

Upon his original arraignment under the indictment, movant plead not guilty thereto.

On July 30, 1943, movant was convicted by a jury, and was sentenced to five (5) years on Count One for violation of Title 18, U.S.C., Section 101, and for a period of two (2) years on Count Two for violation of Title 18, Section 88, which sentences were to run consecutively, making a total of seven (7) years. No appeal followed.

Movant's Contentions

The movant's contentions are:

That the judgment and sentence of two (2) years imposed on Count Two of the indictment was imposed in violation of the Fifth and Sixth Amend-

ments to the Constitution of the United States of America, and that the imposition of said sentence was beyond the jurisdiction of this Honorable Court for the reason that:

(a) That the jury's verdict was returned and is contrary to the Fifth and Sixth Amendments to the Constitution of the United States of America, denying the movant due process of law in that:

The jury rendered a general verdict on Count Two of the indictment, which charged a conspiracy to violate two distinct and separate statutes, whereas one of these clauses does not state an offense against the United States for the reason that no overt act is charged therein or stated as required by law, making this clause totally invalid, thus leaving entirely to guess and presumption any determination as to which of the two clauses, [13] to-wit: the valid or the invalid one, the jury based its findings on.

(b) That he was denied a fair and impartial trial by jury as guaranteed and provided under the Fifth and Sixth Amendments to the Constitution of the United States of America, denying the movant due process of law in that:

The jury was not even partially informed, much less fully informed as required by law, on the statute and the elements thereof which the movant was alleged to have conspired to violate; that the jury therefore could not know what act of the movant's, if any at all, would or did constitute a violation of the statute; that said jury thus being left in ignor-

ance of the law, could not have reached a verdict in strict adherence to the Fifth and Sixth Amendments to the United States Constitution.

Request for Judicial Notice of Court's Records

This motion is based upon the indictment and judgment and sentence and court instructions to the jury, and jury's verdict on file in Criminal Case No. 16048. A Court can and will take judicial notice of its own records. See: *Crescuolo v. Atlas Imperial Diesel Engine Co.* (C.C.A. 9th) 84 Fed. 2d 273 (cited in *Procedure and Jurisdiction*).

Wherefore, your movant respectfully prays that this Honorable Court vacate judgment and sentence on Count Two imposed upon movant in the above-entitled cause for reasons hereinafter stated. [14]

Jurisdiction

Movant is entitled to file this motion under the authority of and in conformity with the provisions contained in the New Title 28, U.S.C., Section 2255—effective September 1, 1948, which provides:

“A prisoner in custody under sentence of a Court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may

move the court which imposed the sentence to vacate, set aside or correct the sentence.”

A motion for such relief may be made at any time.

“Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. * * *” [15]

[Title of District Court and Cause.]

OATH OF VERIFICATION

State of California,
City and County of San Francisco—ss.

Ernest B. Lopez, being first duly sworn deposes and says: That he is the movant in the above said cause by him subscribed. He knows the contents thereof to be true of his own knowledge except to matters stated upon reliable information, and as to such matters he believes them to be true.

/s/ ERNEST B. LOPEZ,

Movant pro-se.

Subscribed and sworn to before me this 30th day of Aug., 1949.

[Seal] /s/ B. MADIGAN,

Associate Warden, United States Penitentiary,
Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Ernest Lopez is a citizen of the United States.

[Endorsed]: Filed September 6, 1949. [16]

EXHIBIT D

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 16048-B-Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST LOPEZ,

Defendant.

Honorable Leon R. Yankwich, Judge presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Thursday, July 29, 1943

Appearances:

For the Plaintiff:

CHARLES H. CARR, Esq.,

U. S. Attorney,

By JAMES M. CARTER, Esq.,

Assistant U. S. Attorney.

For the Defendant:

JOHN A. HOLLAND, Esq.,

PHILIP S. SCHUTZ, Esq. [18]

Court's Charge to the Jury

The Court: Gentlemen of the jury, I want you
to listen very attentatively to the instructions on

Exhibit D—(Continued)

the law given you by the court. These instructions are all written out. I shall read them very slowly and clearly so you will understand. No one will be allowed to come or to go out of the court room until it is completed. If there is anyone who desires to retire, you had better retire now, because you will not be allowed to leave until the jury has gone out.

I may say for your information, if you have not served before, that the instructions of the court will be available to you upon request and they will be sent out to you if after you begin your deliberations you desire to have them before you. So will also any exhibits that you may want, and so will also a copy of the indictment if you desire to refresh your recollection as to that, although I may say that the instructions are very clear. I segregated those which apply to both cases, those which apply to Count One and those which apply to Count Two, so you will not have any difficulty whatsoever in determining what is necessary in order to find a verdict as to either of the counts in the indictment.

The law of the United States permits a judge to [19] comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right nor shall I exercise it in the present case. I shall leave the determination of the

Exhibit D—(Continued)

facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge [20] against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion or public feeling. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassion-

Exhibit D—(Continued)

ately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be.

The offenses with which the defendant is charged are: Receiving stolen public property and conspiracy.

In this connection, you are instructed that the indictment on file herein is a mere charge or accusation against the defendant, and is not any evidence of the defendant's guilt and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged, considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the [21] case, and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to

Exhibit D—(Continued)

speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence; and the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point, and the jury, being convinced that a witness has stated what was untrue, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony [22] with distrust and suspicion, and reject all unless they shall be convinced that, notwithstanding the base character of the witness, he or she has, in other particulars, sworn to the truth.

You are instructed that the law does not require any defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

Exhibit D—(Continued)

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure; it is an essential substantial part of the law and binding on you in this case.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find the defendant not guilty.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of [23] all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of

Exhibit D—(Continued)

jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

You are instructed that while the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. If a defendant elects to take the stand and testify in his own behalf, his testimony is to be weighed in the same manner and measured according to the same standard as the testimony of any other witness, and the tests for determining credibility of witnesses as given you, in another part of the instructions, are to be applied to his testimony alike [24] with that of all other witnesses.

You are instructed that Count 1 of the indictment charges the offense contained in Section 101, Title 18 United States Code Annotated, which provides that

“Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been, embezzled, stolen, or purloined by any

Exhibit D—(Continued)

other person, knowing the same to have been so embezzled, stolen, or purloined * * *”

shall be punished according to law.

The statute makes it a crime (1) to conceal or receive property of the United States Government, knowing the same was stolen, and (2) to retain property, knowing that the same was stolen. Count 1 of the indictment charges the first offense—feloniously receiving and concealing stolen property.

The Court instructs you that ration books and coupons are of government issue and the property of the United States Government.

To convict under this count it is essential to prove (1) that the ration books and coupons were stolen, and (2) that the accused received and concealed them, knowing them [25] to have been stolen, at the time he received and concealed them.

It is not necessary to show that the defendant stole them.

Mere concealment of the ration books and coupons is not sufficient. It must be done with knowledge that the ration books and coupons had been stolen.

Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession and, though only prima facie evidence of guilt, may be of controlling weight, unless explained by the circumstances or accounted for in some way consistent with innocence.

You are instructed that Count 2 of the indict-

Exhibit D—(Continued)

ment charges the offense contained in Section 88, Title 18 United States Code Annotated, which provides that

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall * * *”

be punished according to law.

In order to warrant you in finding a verdict of guilty against the defendant on trial, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as [26] charged in the indictment was entered into between the particular defendant and at least one other person to violate the law of the United States in the manner described in the indictment. It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the conspirators or at their direction or with their aid.

Under the charge made, the conspiracy constitutes the offense and it must be made to appear from the evidence, beyond a reasonable doubt, before a defendant can be convicted, that he was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the

Exhibit D—(Continued)

time that an act was committed, if the evidence shows that there was such. The mere fact that a defendant named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant was a party to the conspiracy and unlawful agreement before his guilt of the offense charged is made out.

Each party to a conspiracy must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one [27] act and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other

Exhibit D—(Continued)

essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if a defendant, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, he would [28] be guilty.

As to the conspiracy count, you will be called upon to consider, as to the defendant on trial, among other things, the following questions:

Was there a conspiracy as charged in the indictment for the objects, or any of them, therein alleged?

If there was such a conspiracy, was the defendant a party to it?

Did the defendant, after the formation of the conspiracy, if such was formed, or another conspirator, commit the overt acts, or any of them, as alleged in the indictment?

If the evidence satisfies you, beyond a reasonable doubt, of the existence of said conspiracy, and that said overt acts were committed by the particular defendant or another conspirator, as alleged in the indictment, and that the particular defendant

Exhibit D—(Continued)

was a party to said conspiracy when said overt acts were committed, you will find him guilty as charged in the indictment; if, however, the evidence fails to so satisfy you of the existence of said conspiracy, or of the commission of any of the said overt acts as alleged in the indictment, or that the particular defendant was a party to such conspiracy when any of said overt acts were committed, then and in that event, you will find the particular defendant not guilty. [29]

By the term “overt act” as used in these instructions, is meant any act committed by any one or more of the conspirators, if the evidence shows there was in fact a conspiracy, which act was intended to and had a tendency to forward the purpose of the conspiracy. Such act may be an agreement between two or more of the conspirators, if the evidence shows there was a conspiracy, or it may be of any act performed by any one of the conspirators, if there was a conspiracy, that would have a tendency to forward the purpose of the conspiracy and the intent of the conspirators or that would have a tendency to accomplish the purpose of the conspiracy.

Your first duty upon retiring to the jury room will be to select one of your number to act as foreman in the case.

The jury in Federal cases is what is known as a common law jury. It requires unanimity before a verdict can be returned. In other words, all 12

Exhibit D—(Continued)

of you must agree before a verdict can be returned upon either count of the indictment.

For your assistance the clerk has prepared a form of verdict which is entitled in the court and cause. I will not read that portion. It reads:

“We, the jury in the above-entitled case, find the defendant, Ernest Lopez, as charged in the first count of the Indictment, and [30].....
..... as charged in the second count of the Indictment.

“Dated: Los Angeles, Calif., July, 1943.

.....,

“Foreman of the Jury.”

If you find the defendant guilty as charged in Count One of the Indictment, you will insert the word “guilty.” If you find him not guilty as to Count One, you will insert those words. If you find him guilty as to Count Two, you will insert the word “guilty” there. And if you find him not guilty as to Count Two, you will insert the proper words.

It is not necessary that the same verdict be found as to both counts in the indictment.

Whichever your verdict is, when arrived at by all of you it must be dated, signed by your foreman, and returned to this court.

Are there any exceptions to the charge given by the court?

Mr. Schutz: No, your Honor.

The Court: The Government?

Exhibit D—(Continued)

Mr. Carter: The Government is satisfied.

The Court: The clerk will swear the bailiffs.

(Two bailiffs were sworn by the clerk to take charge of the jury.)

The Court: You will now be taken into custody by the [31] officers of this court and begin your deliberations in this case.

Court will stand at recess until the return of the jury.

(The jury retired from the court room at 5:00 o'clock p.m. in custody of the bailiffs and returned into the court room at 5:25 p.m. of the same day.)

The Court: Let the record show that the jury has returned to the court room and the defendant is in court with his counsel.

Gentlemen of the jury, have you arrived at a verdict?

Juror White: We have, your Honor.

The Court: Will you hand the verdict to the bailiff, please? The clerk will read the verdict.

(The clerk read as follows:)

Exhibit D—(Continued)

“In the District Court of the United States in
and for the Southern District of California,
Central Division

No. 16048 Crim.

“UNITED STATES OF AMERICA,
Plaintiff,
vs.

“ERNEST LOPEZ,
Defendant.

VERDICT OF THE JURY

“We, the jury in the above-entitled case, find
the defendant, Ernest Lopez, guilty as charged in
the first count of the Indictment, and guilty as
charged in the second count of the Indictment. [32]

“Dated: Los Angeles, Calif., July 29th, 1943.

“LEON A. WHITE,
“Foreman of the Jury.”

So say all of you?

The Court: The clerk will enter and record the
verdict.

Gentlemen of the jury, we desire to thank you for
the time you have given us in this case, and you
will be excused until notified.

What is the desire of counsel in regard to sen-
tence?

Exhibit D—(Continued)

Mr. Holland: If your Honor please, at this time I would like to ask that there be a pre-sentence investigation of the defendant and that all of the facts may come before the court.

The Court: I do not think I need a pre-sentence investigation in this case. Any facts you may want to call to my attention, you may. As I say, I am leaving for San Diego and will not be back until August. And any facts in the record of this defendant can be promptly presented tomorrow at 2:00 o'clock. I will set the imposition of sentence for that time.

In the meantime I will exonerate the bail and the defendant here will be taken into custody at this time.

Mr. Holland: Before your Honor makes that statement—I can understand how your Honor feels, but I took this matter up this afternoon with the bondsmen and they were willing that he remain on bond. [33]

The Court: Not in a case of this character. The defendant will be taken into immediate custody.

Mr. Holland: At 2:00 tomorrow?

The Court: 2:00 tomorrow. I would make it Saturday but we have a meeting of judges and I cannot do it.

I will be glad to hear anything you have to say about this man's record, and the United States Attorney will also present anything he desires.

Mr. Carter: Could we dispose of all the exhibits in the case by stipulation?

Exhibit D—(Continued)

The Court: Not at the present time, no. No; I would not do that until sentence time has elapsed. We never do that in a case of this character until the defendant is sentenced at least. [34]

REPORTER'S CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct partial transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of September, A.D. 1947.

/s/ ALBERT H. BARGION,
Official Reporter. [35]

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 7th day of November, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For hearing defendant's motion to vacate judgment and sentence on count 2; S. L. Johnson, Esq., Ass't U. S. Att'y, appearing as counsel for Gov't; Philip Gordon, Esq., heretofore appointed, appearing as counsel for defendant;

Court orders cause continued to 2 p.m. At 2 p.m. court reconvenes herein and all being present as before, including counsel for both sides;

Attorney Gordon argues to the Court. Hand-written copy of movant's reply brief is filed. Court makes a statement and orders said motion denied.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER ON MOTION PUR-
SUANT TO 28 U.S.C., SECTION 2255

The Motion of the defendant filed September 6, 1949, to Vacate the Judgment and Sentence imposed July 30, 1943, on Count Two of the Indictment having come on for hearing and having been heard by the Court on November 7, 1949, after Notice given to the United States Attorney and without requiring the attendance of the defendant at the hearing, the Court now determines the issues and makes the following Findings of Fact, Conclusions of Law and Order with respect thereto:

Findings of Fact

It appears from the Motion filed by the defendant on September 6, 1949, from the files and records in this case and from the affidavits and other evidence adduced upon the hearing of this motion, and the Court accordingly finds:

I.

On June 16, 1943, an Indictment was returned by the Grand Jury and filed in this Court charging the defendant in two counts as follows: Count One charged [37] the violation of 18 U.S.C., Section 101; Count Two charged a violation of 18 U.S.C. Section 88.

Thereafter on June 25, 1943, defendant was regularly arraigned and entered pleas of Not Guilty to the offenses charged in the said two counts of

the indictment. At the time of the arraignment and plea and during the trial of this case, defendant was represented by John Holland and Phillip S. Schutz, attorneys at law.

II.

Thereafter on July 27th and 29th, 1943, the defendant was tried before a jury and was found guilty as charged in both counts of the indictment. Subsequently, on July 30, 1943, defendant appeared with his counsel for sentencing. The Court duly ordered and adjudged that the defendant, having been found guilty by the jury, be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five years in the penitentiary on Count One and two years in the penitentiary on Count Two, the sentences to run consecutively.

III.

Thereafter on October 8, 1945, defendant filed a motion to vacate judgment and sentence. On October 22, 1945, this Court made and entered an order denying defendant's motion to vacate judgment and sentence. On November 6, 1945, defendant filed a notice of appeal from said order denying the motion to vacate judgment. In addition to his notice of appeal, the defendant filed in the District Court an application for leave to prosecute in forma pauperis the appeal sought to be taken by him from the order denying his motion. However, the District Court also denied that application

on November 13, 1945. On November 29, 1945, an opinion was filed by the Circuit Court of Appeals for the Ninth Circuit dismissing the defendant's appeal from the order of October 22, 1945.

IV.

Thereafter on September 6, 1949, defendant filed another motion to vacate judgment upon which these findings and order are based. Phillip Gordon, attorney at law, was appointed by the Court to represent the defendant on said motion. [38]

Conclusions of Law

From the foregoing Findings of Fact, and from the files and records in this case, the Court makes the following Conclusions of Law:

I.

The lapse of a period of six years between the date of defendant's conviction in the District Court and the date of the filing of this motion to vacate judgment is a sufficient bar to the vacation of defendant's judgment and conviction on his motion under Section 2255 of Title 28, U.S.C.A.

II.

The defendant's designations of error that the verdict of the jury as rendered was a denial of due process of law as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States of America, and that he was denied a fair and impartial trial by jury as guaranteed under

the Fifth and Sixth Amendments, in that the instructions given to the jury by the Trial Court were erroneous, cannot be raised upon a motion to vacate judgment under Section 2255 of Title 28, U.S.C.A., since a motion to vacate judgment under Section 2255 cannot be used to review the proceedings of the trial as upon appeal.

III.

The Court at said hearing considered the alleged deficiencies in the instructions on the merits. Upon such consideration the Court concludes that the instructions given by the Court defined adequately the offenses charged in both counts of the indictment in the very language of the statutes under which the said counts were drawn. In addition thereto, the Court in very elaborate instructions fully set forth the elements necessary to constitute an offense under each count of the indictment. The instructions in said case were written and are on file in said case. They show, and the Court concludes that unlike the cases upon which the petitioner relies, the jury in the present case were fully and adequately instructed as to the law governing each of the offenses set forth in the indictment.

IV.

Defendant was not denied due process of law or a fair and impartial trial by jury guaranteed under the Fifth and Sixth Amendments of the United States [39] Constitution or either of them.

V.

It is, therefore, concluded that the Motion of the defendant must be denied.

ORDER

By reason of the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered that the Motion of the defendant, Ernest B. Lopez, Filed September 6, 1949, to Vacate the Judgment and Sentence imposed on or about July 30, 1949, for the offense charged in Count Two of the Indictment, upon all grounds stated in said Motion, be and the same is hereby denied.

It Is Further Ordered that the defendant be and is hereby advised that the provisions of Section 2255 of Title 28 of the United States Code accord him the right of an appeal to the Court of Appeals from this order denying his Motion, and the defendant is further informed that Rule 37(a)(2) of the Federal Rules of Criminal Procedure provides in part that:

“An appeal by a defendant may be taken within ten (10) days after entry of the judgment or order appealed from * * * When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant.”

It Is Further Ordered that the Clerk this day serve a copy hereof by United States Mail on the

defendant, Ernest B. Lopez, [PMB 697, Alcatraz, California.]

Done in Open Court this 28th day of November, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Approved as to Form:

ERNEST A. TOLIN,
U. S. Attorney.

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief of Criminal Division.

LEILA F. BULGRIN,
Assistant U. S. Attorney,
Attorneys for U. S. of A.

PHILIP GORDON,
Attorney for Ernest B. Lopez.

[Endorsed]: Filed Nov. 28, 1949.

In the District Court of the United States for the
Southern District of California, Central Division

Cr. No. 16048

UNITED STATES OF AMERICA,

Respondent,

vs.

ERNEST B. LOPEZ,

Movant.

NOTICE OF APPEAL

Please take notice, that above-named movant hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the United States District Court for the Southern District of California, Central Division, entered in the office of the Clerk of said Court on November 28, 1949, denying Movant's motion to vacate judgment and sentence on count two (2) in Criminal Case No. 16048, and from each and every part of said order as well as from the whole thereof.

Respectfully submitted,

/s/ ERNEST B. LOPEZ,

Movant Appellant, pro se.

Copy Mailed U. S. Atty., Nov. 28, 1949.

[Endorsed]: Filed November 28, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

Movant-Appellant intends to rely upon the following points on this appeal.

1. The jury rendered a general verdict on Count Two of the indictment, which charged a conspiracy to violate two distinct and separate statutes, whereas one of these clauses does not state an offense against the United States for the reason that no overt act is charged therein or stated as required by law, making this clause totally invalid, thus leaving entirely to guess and presumption any determination as to which of the two clauses, to wit: the valid or the invalid one, the jury based its findings on.

2. The jury was not even partially informed, much less fully informed as required by law, on the statute and the elements thereof which the movant was alleged to have conspired to violate; that the jury therefore could not know what act of the movants, if any at all, would or did constitute a violation of the statute; that said jury thus being left in ignorance of the law, could not have reached a verdict in strict adherence to the Fifth and Sixth Amendments to the United States Constitution.

3. That he was denied a fair and impartial trial by jury as guaranteed and provided under the Fifth and Sixth Amendments to the Constitu-

tion of the United States of America, denying the movant due process of law.

4. That the jury's verdict was returned and is contrary to the Fifth and Sixth Amendments to the Constitution of the United States of America, denying the movant due process of law.

5. That the judgment and sentence of two (2) years imposed on Count Two of the indictment was imposed in violation to the Constitution of the United States of America, and that the imposition of said sentence was beyond the jurisdiction of this Honorable Court.

6. The District Court erred in denying the Motion to Vacate the judgment and sentence under Count two of the indictment No. 16048.

/s/ ERNEST B. LOPEZ,

Appellant in propria persona.

Dated: November 21, 1949.

[Endorsed]: Filed November 28, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Ernest B. Lopez, the movant-appellant above named, hereby designates the following record in the above-entitled cause for inclusion in the record on appeal, the same include therein the following:

1. Motion to Vacate Judgment and Sentence on Count two filed on September 6, 1949 (omitting the brief in support).

2. Exhibit "A" consisting of the indictment No. 16048.

3. Exhibit "B" consisting of the Jury's verdict.

4. Exhibit "C" consisting of the Judgment and Sentence.

5. Exhibit "D" consisting of Instructions to Jury.

6. Notice of Appeal.

7. The Court's order of November 7, 1949, denying said Motion.

8. Finding of fact and conclusions of law.

9. Memorandum opinion (none filed).

10. This Designation of Contents of Record on Appeal.

11. Statement of Points to be Relied Upon on Appeal.

12. Clerk's Certificate.

Dated: November 21, 1949.

/s/ ERNEST B. LOPEZ,
Movant-Appellant
In Propria persona.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 28, 1949.

[Title of District Court and Cause.]

SUPPLEMENT TO STATEMENT OF POINTS
TO BE RELIED UPON ON APPEAL, AND
DESIGNATION OF CONTENTS OF REC-
ORD ON APPEAL

Ernest B. Lopez, the movant-appellant above named, hereby supplements his Statement of Points to be Relied Upon on Appeal, and his Designation of Contents of Record on Appeal.

Statement of Points to Be Relied Upon Appeal

7. Motion To Vacate Under 2255 of the new Title 28 is not barred by lapse of six years since conviction. "Motion can be filed at any time." (Title 28, Section 2255.)

8. Motion to Vacate Under 2255—Title 28 can be granted at any time when the records on file show that the movant-appellant jury was not once told or instructed as to what United States laws or statute the movant-appellant was charged and was

being tried for conspiring to violate, because such error goes to the jurisdiction and violates the right of due process under the Fifth Amendment and the right to a fair and impartial trial under the Sixth Amendment.

9. That the Court erred in not making Findings of Facts, and Conclusions of Law, as required under Sec. 2255 of Title 28, on movant-appellant first point raised in his Motion to Vacate.

Movant-Appellant hereby supplements his designation of contents of record on appeal with the following:

13. This "Supplement To Statement of Points to be Relied Upon On Appeal, and Designation of Contents of Record on Appeal."

14. Clerk's Certificate.

Dated: December 5, 1949.

/s/ ERNEST B. LOPEZ,
Movant-Appellant,
In Propria Persona.

Copy Mailed U. S. Atty. Dec. 7, 1949.

[Endorsed]: Filed December 7, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of Cali-

foria, do hereby certify that the foregoing pages numbered from 1 to 46, inclusive, contain the original Indictment; Verdict of the Jury; Judgment and Commitment; Motion to Vacate Judgment and Sentence on Count Two and Exhibit D thereto consisting of reporter's transcript of Proceedings on July 29, 1943 (Exhibits A, B and C are omitted as they are but certified copies of the Indictment, Verdict of the Jury and Judgment and Commitment, the originals of which are certified as a part of the record); Findings of Fact, Conclusions of Law and Order on Motion Pursuant to 28 U. S. C., Section 2255; Notice of Appeal; Statement of Points to be Relied Upon on Appeal; Designation of Contents of Record on Appeal and Supplement to Statement of Points to be Relied Upon on Appeal and Designation of Contents of Record on Appeal and a full, true and correct copy of Minute Order Entered November 7, 1949, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fee for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 27th day of December, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12439. United States Court of Appeals for the Ninth Circuit. Ernest B. Lopez, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 28, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12439

ERNEST B. LOPEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINT AND DESIGNATION
OF CONTENTS OF RECORD ON APPEAL

Appellant intends to rely upon the following points on this appeal.

1. The jury rendered a general verdict on count two of the indictment, which charged a conspiracy to violate two distinct and separate statutes, whereas one of these clauses does not state an offense

against the United States for the reason that no overt act is charged therein or stated as required by law, making this clause totally invalid, thus leaving entirely to guess and presumption any determination as to which of the two clauses, to wit: the valid or the invalid one, the jury based its findings on.

2. The jury was not even partially informed, much less fully informed as required by law, on the statute and the elements thereof which the appellant was alleged to have conspired to violate; that the jury therefore could not know what act of the appellant, if any at all, would or did constitute a violation of the statute; that said jury thus being left in ignorance of the law, could not have given a fair trial and reached a verdict in strict adherence to the Fifth and Sixth Amendments to the United States Constitution.

3. That he was denied a fair and impartial trial by jury as guaranteed and provided under the Fifth and Sixth Amendments to the Constitution of the United States of America, denying the appellant due process of law.

4. That the jury's verdict was returned and is contrary to the Fifth and Sixth Amendments to the Constitution of the United States of America, denying the appellant due process of law.

5. That the Judgment and Sentence of (2) years imposed on Count two of the indictment was imposed in violation of the Fifth and Sixth Amend-

